

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JULIE LYNN MOORE,	)	
	)	No. CV-11-268-CI
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
v.	)	MOTION TO DISMISS AND
	)	DISMISSING PLAINTIFF'S
MICHAEL J. ASTRUE, Commissioner	)	COMPLAINT
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

BEFORE THE COURT is Defendant's Motion to Dismiss Plaintiff's Complaint for lack of subject-matter jurisdiction, Plaintiff's Response to the court's Order to Show Cause why her Complaint should not be dismissed, and Defendant's Reply to Plaintiff's Response. ECF No. 8, 12, 13, 14. Attorney Jeffrey Schwab represents Julie Lynn Moore (Plaintiff); Special Assistant United States Attorney Nancy Mishalanie represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 11. After reviewing the file and briefs submitted by the parties, the court **GRANTS** Defendant's Motion to Dismiss and dismisses Plaintiff's Complaint with prejudice.<sup>1</sup>

<sup>1</sup> Both parties have submitted documents as exhibits to their pleadings that the court has considered in its evaluation of Defendant's Motion to Dismiss. ECF No. 10, 13. The court may

**FACTUAL BACKGROUND**

Plaintiff seeks review pursuant to 42 U.S.C. § 405(g) of the Commissioner's denial of disability insurance benefits (DIB) under Title II of the Social Security Act. Plaintiff protectively filed her Title II application on October 3, 2008. Her application was denied initially on March 4, 2009, and she filed a request for reconsideration. Benefits were denied on reconsideration on July 20, 2009. ECF No. 10 at 21. In the Social Security Administration's (SSA) Notice of Reconsideration, Plaintiff was advised that she could appeal the denial by filing a Request for Hearing by an administrative law judge (ALJ) within 60 days (plus 5 days for mailing) of the date of the notice, i.e., until September 23, 2009. *Id.*; ECF No. 9 at 6.

Defendant's exhibits show that on November 3, 2009, Plaintiff spoke with a representative from the local SSA and completed a Request for Hearing by Administrative Law Judge in which she acknowledged the request was not timely filed. ECF No. 10 at 23-24. On November 17, 2009, ALJ R.S. Chester informed Plaintiff her Request for Hearing was untimely and allowed her to submit information to show she had "good cause" for not filing her request within the prescribed 60-day period. ECF No. 10 at 26; ECF No. 15 at 9. On November 18, 2009, Plaintiff's attorney submitted an unsworn "Good Cause statement," dated November 5, 2009, signed by Plaintiff, and in which Plaintiff indicated she had sent her appeal

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properly consider these exhibits without converting the Motion to Dismiss into a motion for summary judgment. See FED. R. CIV. P. 10(c).

1 "online" at the end of September 2009. She stated when she called  
2 the local Social Security office in Wenatchee, "a lady from the  
3 office in Wenatchee . . . said she saw it there." ECF No. 15 at  
4 10; ECF No. 10 at 29. ALJ Chester found Plaintiff's statement did  
5 not establish good cause for the untimely filing and dismissed her  
6 request for hearing on November 25, 2009. ECF No. 10 at 30-33. He  
7 specifically found that "the reconsideration determination dated  
8 November 3, 2009, is dismissed and the reconsideration determination  
9 dated July 20, 2009, remains in effect."

10 On January 14, 2010, Plaintiff requested a review of the ALJ's  
11 dismissal and an extension of 60 days to provide additional  
12 evidence. ECF No. 10 at 34. On January 26, 2010, Plaintiff's  
13 representative asked for a copy of claimant's exhibit file and  
14 hearing recording. ECF No. 15 at 21. A request for additional time  
15 (25 days) was granted on November 23, 2010. ECF No. 10 at 35. On  
16 February 17, 2011, the Appeals Council notified Plaintiff's attorney  
17 there was no hearing recording because no hearing was held and  
18 granted an additional 25 days for Plaintiff to submit evidence. ECF  
19 No. 15 at 22.

20 Plaintiff's counsel reiterated his request for an exhibit file  
21 on March 14, 2011. ECF No. 15 at 25. Plaintiff's request for  
22 review of the ALJ's dismissal of her request for an ALJ hearing was  
23 denied by the Appeals Council on May 26, 2011. ECF No. 10 at 41  
24 (*Notice of Appeals Council Action*). In its Notice, the Appeals  
25 Council found that no additional evidence to establish good cause  
26 was submitted, and no exhibit file was provided because there was no  
27 hearing held; therefore, there was no exhibit file in connection  
28 with Plaintiff's claim. *Id.*

**LEGAL STANDARD**

In seeking Social Security benefits, a claimant's failure to follow administrative procedures within the stated time period, without "good cause," precludes further administrative review and the right to judicial review. 20 C.F.R. § 404.900(b). Sections 405(g) and (h) of the Social Security Act require a claimant to have obtained a "final decision . . . made after a hearing," to obtain judicial review of a decision of the Commissioner. 42 U.S.C. § 405(g); *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9<sup>th</sup> Cir. 2000). A final decision is defined as "(1) presentment of the claim for benefits to the Commissioner, and (2) complete exhaustion of administrative remedies." *Johnson v. Shalala*, 2 F.3d, 918, 921 (9<sup>th</sup> Cir. 1993). The Ninth Circuit has ruled specifically that the Commissioner's discretionary decision to dismiss an untimely request for review is not a "final decision" under § 405(g) and not subject to judicial review. *Matlock v. Sullivan*, 908 F.2d 492, 493 (9<sup>th</sup> Cir. 1990) (judicial review of denial of untimely request for review would "frustrate Congress' intent to forestall belated litigation of stale claims"); see also *Brandtner v. Department*, 150 F.3d 1306, 1307 (10<sup>th</sup> Cir. 1998). Thus, where a claim is dismissed due to a claimant's failure to request an ALJ hearing within the applicable time period without good cause, subject-matter jurisdiction is lacking under 42 U.S.C. § 405(g); *Hoye v. Sullivan*, 985 F.2d 990, 991 (9<sup>th</sup> Cir. 1993).

Absent complete exhaustion, the district court nevertheless has subject-matter jurisdiction if there is a "colorable constitutional claim" that would otherwise provide independent subject-matter jurisdiction. *Evans v. Chater*, 110 F.3d 1480, 1482-83 (9<sup>th</sup> Cir. 1997); *Hoye*, 985 F.2d at 991. A constitutional claim is not

1 colorable if made solely for the purpose of obtaining jurisdiction,  
2 is insubstantial, or frivolous. An unsupported allegation of a due  
3 process violation does not raise a "colorable" claim sufficient to  
4 render subject-matter jurisdiction. *Hoye, supra*, at 991-92.

5 In addition, the exhaustion requirement may be waived by the  
6 court if a claimant makes a showing that: (1) her claim is  
7 collateral to a substantive claim for benefits (collaterality); (2)  
8 denial of relief will cause irreparable harm (irreparability); and  
9 (3) further exhaustion would be futile, *i.e.*, resolution of the  
10 claim by the court "would not serve the purposes of exhaustion<sup>2</sup>  
11 (futility)." *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9<sup>th</sup> Cir. 2003)  
12 (*quoting Johnson*, 2 F.3d at 921); *see also Heckler v. Ringer*, 466  
13 U.S. 602, 618 (1984) (court may not second-guess the Commissioner's  
14 judgment where administrative procedures reasonably fulfil the  
15 purposes of exhaustion). Examples of claims held to merit waiver of  
16 the exhaustion requirement are claims challenging the Commissioner's  
17 failure to ensure uniform standards in review, the agency's policy  
18 of withholding benefits when SSI beneficiaries are without a  
19 representatives; claims of violation of a constitutional right. *Id.*

#### 20 ISSUES

21 The primary issue presented is whether this court has subject-  
22 matter jurisdiction. Defendant contends the court does not have  
23 subject-matter jurisdiction because Plaintiff failed to fully

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25 <sup>2</sup> The exhaustion requirement not only allows the agency to  
26 compile a complete factual record, it allows the agency to apply its  
27 very specialized expertise in "administering its own regulations."  
28 *Kildare*, 325 F.3d at 1084.

1 exhaust her claim. Specifically, he argues Plaintiff did not file  
2 a timely request for an ALJ hearing and the Appeals Council properly  
3 denied Plaintiff's appeal of the ALJ's dismissal of her request for  
4 hearing. ECF No. 10. Absence of an ALJ hearing is not disputed,  
5 but Plaintiff appears to argue she was denied due process because  
6 Defendant did not provide her with a copy of her exhibit file so she  
7 could determine if the ALJ "overlooked a timely online appeal." ECF  
8 No. 15 at 4. She also contends she was denied her right to appeal  
9 the ALJ's dismissal of her case.<sup>3</sup> *Id.* at 4-5.

#### 10 DISCUSSION

##### 11 A. The Complaint

12 Plaintiff filed a Complaint for judicial review on July 19,  
13 2011. ECF No. 1. In her Complaint she alleges "the evidence was  
14 taken and the hearing as held and as a result, Plaintiff's claim was  
15 dismissed on November 25, 2009." *Id.* at 1. She further alleges a  
16 "timely appeal was taken to the Appeals Council . . . and after  
17 consideration by the Appeals Council, Plaintiff's claim for Social  
18 Security disability benefits was denied by the Appeals Council by  
19 the Final Order, dated May 26, 2011, and signed by Patricia Smith,  
20 Administrative Appeals Judge." *Id.* at 2. However, this misstates  
21 the facts, which are established by exhibits attached to  
22 Plaintiff's Response to Defendant's Motion to Dismiss.

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24 <sup>3</sup> Careful review of the pleadings indicates the ALJ did not  
25 dismiss her case; rather he dismissed her request for an ALJ hearing  
26 which effectively ended the administrative process without a "final  
27 order after hearing" necessary for judicial review. See *Bowen v.*  
28 *City of New York*, 476 U.S. 467, 471-72 (1986); 42 U.S.C. § 405(g).

1 For example, Defendants' exhibits show Plaintiff's request for  
2 an ALJ hearing, dated November 3, 2009, was denied by ALJ Chester on  
3 November 25, 2009, after he had given her additional time to show  
4 good cause why her request for hearing was not filed within the  
5 requisite 65 days. ECF No. 10 at 31-32. As stated in her  
6 memorandum, Plaintiff "does not dispute that no hearing was held."  
7 ECF No. 15 at 5.

8 Further, Plaintiff's characterization of the Appeals Council's  
9 action denying review of the ALJ's request for hearing as a "Final  
10 Order" is without factual or legal basis. As found by the Supreme  
11 Court, the Appeals Council discretionary decision to dismiss an  
12 untimely request for review is not a "final decision of the  
13 Secretary made after a hearing" under § 405(g). *Califano v.*  
14 *Sanders*, 430 U.S. 99, 108 (1977).

15 Plaintiff's mere allegation in her Complaint that she is  
16 appealing a "Final Order" of the Commissioner is not sufficient to  
17 confer subject-matter jurisdiction. Documentation submitted by both  
18 parties establishes as a matter of law that Plaintiff did not  
19 request a hearing by an ALJ within the requisite 60 days (plus days  
20 for mailing), her untimely request for hearing was denied for  
21 failure to show good cause, no ALJ hearing was held, the Appeals  
22 Council properly exercised its discretion in denying review of the  
23 ALJ's dismissal of her request, and no final decision after hearing  
24 was obtained. ECF No. 10, ECF No. 15.

25 With these facts established, the Social Security Act does not  
26 permit judicial review unless Plaintiff demonstrates waiver of the  
27 exhaustion requirement is justified, or constitutional questions are  
28 in issue. *Bowen*, 476 U.S. at 471-477 (1986) (summarizing SSA

1 administrative process to satisfy exhaustion requirement and bases  
2 for waiver of exhaustion); *Sanders*, 430 U.S. at 109 (constitutional  
3 claims do not require exhaustion).

4 **B. Waiver of the Exhaustion Requirement**

5 Plaintiff effectively asks this court to waive the exhaustion  
6 requirement and remand her case to the Commissioner for an  
7 administrative hearing to be held to consider the "timeliness" of  
8 her request for hearing so she can fully exhaust her claim for  
9 benefits. ECF No. 15 at 6. Plaintiff makes no showing that the  
10 three elements required for waiver, collaterality, irreparability,  
11 and futility, are present.

12 Her claim is not collateral to a claim for benefits. A claim  
13 is collateral if it is not "inextricably intertwined" with a claim  
14 for benefits. For example, a claim is collateral if it challenges  
15 administrative policies and procedures, and does not interfere  
16 prematurely with agency processes. *Johnson v. Shalala*, 2 F.3d 918,  
17 922 (9<sup>th</sup> Cir. 1993); see also *Kildare*, 325 F.3d at 1082 (a collateral  
18 claim "rises and falls on its own, separate from the merits of [a  
19 claimant's] claim for benefits") (quoting *Heckler v. Ringer*, 466 U.S.  
20 602, 618 (1984)). Here, Plaintiff's claim before this court is  
21 "entirely dependant on her underlying claim for benefits." *Id.* It  
22 is not a meritorious challenge to policy or established procedures.  
23 Specifically, she requests this court to reverse ALJ Chester's  
24 decision denying her request for hearing and order a hearing on the  
25 "timeliness of her appeal." ECF No. 15 at 6. Thus, her claim is a  
26 clear challenge to the merits of the ALJ's decision and an attempt  
27 to reinstate her claim for benefits. See *Bowen v. City of New York*,  
28 476 U.S at 483.



1 Plaintiff has not alleged facts to constitute a "colorable  
2 claim" of irreparability. To do so, she must show that exhaustion  
3 would have caused her harm that could not be repaired through  
4 retroactive payments. See *Johnson v. Shalala*, 2 F.3d at 922. She  
5 makes no such showing.

6 Finally, Plaintiff makes no showing that the purposes of the  
7 exhaustion requirement are irrelevant to her case. The exhaustion  
8 requirement allows the SSA to compile a detailed factual record for  
9 each claimant, apply agency expertise, correct its own errors  
10 through administrative review, and conserve judicial resources.  
11 *Johnson*, 2 F.3d at 922. Exhaustion would not be futile in  
12 Plaintiff's claim for benefits. It would allow for a factual record  
13 to be developed and assessed by agency experts to determine if she  
14 is eligible for benefits. Plaintiff's failure to comply with  
15 administrative requirements does not render exhaustion futile or  
16 justify waiver of the exhaustion requirement.<sup>4</sup>

### 17 C. Constitutional Claim

18 In *Califano v. Sanders*, 430 U.S. 99, 107-09 (1977), the Supreme  
19 Court recognized an exception to the exhaustion requirement where  
20 there is a colorable constitutional claim. *Bray v. Astrue*, \_\_\_\_  
21 F.3d \_\_\_\_ (9<sup>th</sup> Cir. 2012), available at 2012 WL 3901540. The Ninth  
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23 <sup>4</sup> Plaintiff, in essence, asks the court to substitute its  
24 judgment for that of the ALJ, order her case back to the  
25 Commissioner for the very process that exhaustion requires. This is  
26 not the role of the reviewing court under § 405(g). 20 C.F.R. §§  
27 416.1468(b), .1403(a)(8), .1460, .1457; *Matlock*, 908 F.2d 493-94;  
28 see also *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9<sup>th</sup> Cir. 1999).

1 Circuit has held specifically that this exception applies to a  
2 constitutional claim of due process violation that implicates a  
3 meaningful opportunity to be heard or to seek reconsideration of an  
4 adverse benefits determination. A "'mere allegation of a due  
5 process violation' is not a colorable constitutional claim." *Bray*,  
6 2012 WL 3901540, *supra* at \*4 (citing *Hoye*, 985 F.2d at 992).

7 Plaintiff's attempt to characterize the agency's alleged denial  
8 of access to her file as a constitutional issue is unpersuasive.  
9 Plaintiff failed to exhaust her administrative remedies, despite  
10 several extensions of time to file evidence of good cause.  
11 Correspondence submitted by the parties indicate Plaintiff was given  
12 meaningful opportunities to submit additional information to support  
13 her contention that she had filed online, but she submitted nothing  
14 more than a brief, unsworn statement that she filed online sometime  
15 in September 2009. The ALJ's conclusion that this statement did not  
16 establish good cause is not judicially reviewable. *Matlock*, 908  
17 F.2d at 494. Further, the court file shows when Plaintiff talked  
18 with a SSA representative on November 3, 2009, to complete a Request  
19 for Hearing by an ALJ, she acknowledged that her request for hearing  
20 was untimely, and offered no explanation or proof that she had filed  
21 within the required 60 days. ECF No. 10 at 23-24.

22 Exhibits submitted show Plaintiff's representative's requests  
23 for an exhibit file and hearing recording were acknowledged by the  
24 agency and, as explained by the agency, there was neither an exhibit  
25 file compiled nor recording made because a hearing was never held.  
26 ECF No. 15 at 21-23. Indeed, Plaintiff's failure to adhere to  
27 administrative procedures and request a hearing within the requisite  
28 60 days prevented the creation of the exhibit file she was seeking.

1 Plaintiff cites no legal authority for her contention that the  
2 denial of her request for an exhibit file after the November 25,  
3 2009, dismissal rises to the level of a substantive or procedural  
4 due process violation that would warrant waiver of the exhaustion  
5 requirement.

6 Plaintiff's argument that she was denied her right to appeal  
7 the ALJ's dismissal of her request for hearing is not supported by  
8 exhibits submitted by both parties. See ECF No. 10 at 26, 30-32,  
9 35-38; ECF No. 15 at 9, 12-13. The Commissioner's regulations  
10 provide that the Appeals Council will review a case under specific  
11 circumstances: where there appears to be an abuse of discretion by  
12 the administrative law judge; there is an error of law; the ALJ's  
13 decision is not supported by substantial evidence; or "there is a  
14 broad policy or procedural issue that may affect the general public  
15 interest." 20 C.F.R. § 404.970(a). Plaintiff makes no showing that  
16 any of these circumstances apply. Rather, she appears to argue the  
17 Appeals Council denial of review after giving her an opportunity to  
18 provide additional evidence was a due process deprivation. Her  
19 argument is without merit.

20 Plaintiff does not allege that she was denied notice or a  
21 meaningful opportunity to be heard. Her bare allegations that she  
22 was denied her right to appeal and her "right to obtain the exhibit  
23 file for review" are insufficient to state a due process claim.  
24 Exhibits submitted to this court show Plaintiff was provided several  
25 notices of decision that explain in detail how to request review and  
26 what her responsibilities were to provide additional evidence. ECF  
27 10 at 18-20, 21-22, 25-26, 30-31. In addition to this notice, the  
28 agency extended the time during which she could to submit

1 information to explain her delay. She did not provide any  
2 additional information or explanation. ECF No. 10 at 26. Plaintiff  
3 fails to raise a constitutional issue that justifies waiver of the  
4 exhaustion requirement.

5 **CONCLUSION**

6 Plaintiff's failure to timely file a request for administrative  
7 law judge hearing precludes judicial review. Because Plaintiff  
8 failed to obtain a final decision under the Social Security Act,  
9 judicial review is not available. Accordingly,

10 **IT IS ORDERED:**

11 1. Defendant's Motion to Dismiss, **ECF No. 8, is GRANTED.**

12 2. Plaintiff's Complaint, **ECF No. 1, 4, is DISMISSED** for lack  
13 of subject-matter jurisdiction under 42 U.S.C. § 405(g).

14 3. Judgment shall be entered for **DEFENDANT.**

15 The Court Executive is directed to file this Order, provide  
16 copies to counsel for the parties, and close the file.

17 DATED January 3, 2013.

18  
19 S/ CYNTHIA IMBROGNO  
20 UNITED STATES MAGISTRATE JUDGE  
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